FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1704 and 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* CITY OF ELYRIA, OHIO, CITY OF NORTH RIDGEVILLE, OHIO, CITY OF AVON LAKE, OHIO AND CITY OF AVON, OHIO IN SUPPORT OF PETITIONER

ERIC H. ZAGRANS *
WOMBLE CARLYLE SANDRIDGE & RICE
1401 Eye Street, N.W., 7th Floor
Washington, D.C. 20005
(202) 857-4516

* Counsel of Record

Counsel for Amici Curiae

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

L. NEILL EDWARDS
WOMBLE CARLYLE SANDRIDGE
& RICE
2530 Meridian Parkway
Suite 400
Durham, North Carolina 27713
(919) 484-2357

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae, the Cities of Elyria, North Ridgeville, Avon Lake, and Avon, Ohio, are four chartered municipal corporations located in Lorain County in northeastern Ohio. They maintain that the Sixth Circuit's erroneous construction of the Commerce Clause and invalidation of Ohio's investment tax

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

credit set forth in O.R.C. § 5733.33 will have profoundly adverse impacts on their local economies. Thousands of jobs and millions of investment dollars are in jeopardy of being lost in Lorain County, Ohio, alone if the Sixth Circuit's decision invalidating the Ohio investment tax credit were permitted to stand.

Ohio should be free to "structure [its] tax system[] to encourage the growth and development of [its own] intrastate commerce and industry." *Boston Stock Exchange v. Tax Comm'n*, 429 U.S. 318, 336 (1977). This is central to Ohio's ability to hold its own in interstate competition with other states for economic development, manufacturing facilities and job creation. As this Court has emphasized, "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

Ohio's investment tax credit is central to the successful efforts of the State of Ohio and its political subdivisions to encourage new local capital investment by foreign and domestic manufacturing businesses alike. Because the four municipalities would be severely hampered in their ability to compete for economic development and revitalization of their industrial base without the ability to use incentives such as Ohio's investment tax credit, *amici* have a substantial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The Ohio investment tax credit does not violate the dormant Commerce Clause. In fact, it promotes both interstate and intrastate commerce by providing incentives for additional economic development and capital investment in local communities in Ohio.

For a company with no presence in Ohio, the investment tax credit encourages the interstate location of new facilities in Ohio without any "coercion" from Ohio's franchise tax

because the company has no pre-existing Ohio tax liability and would be taxed (subject to the credit) only on its new business activities in Ohio. If, however, the foreign corporation chose to invest in another state instead of Ohio, there would be no Ohio tax liability and the investment tax credit would have no extraterritorial impact—neither increasing nor decreasing the corporation's franchise tax liability in another state.

For a company already present and conducting business operations in Ohio, the actual effect of the investment tax credit on its decision whether to invest in new machinery and equipment within or outside Ohio is the opposite of the Sixth Circuit's misassumption that any in-state benefit must create a corresponding out-of-state economic burden. If the company chooses to expand its existing business activities in Ohio, the in-state capital investment that boosts production and sales will typically ***increase*** the company's Ohio franchise tax liability which is calculated on both a net worth and net income basis and levied on the higher of the two tax computations. The partial tax credit usually offsets only a portion of the company's ***future*** tax liability as a result of its newly-augmented taxable base. O.R.C. §§ 5733.05(B) and (C); 5733.06. Conversely, if the corporation chooses to invest out-of-state rather than in Ohio, its Ohio franchise tax liability is likely to be reduced under Ohio's apportionment formula[2] because the out-of-state investment decreases the percentage of the company's Ohio business value and activity subject to taxation in Ohio vis-à-vis the company's aggregate activities measured on a national scale. Far from increasing the Ohio franchise tax burden on a company already doing business in Ohio, its out-of-state investments would add to the flow of interstate commerce and would generally ***reduce*** the company's pre-existing Ohio franchise tax liability. Thus, the Ohio investment tax credit neither burdens out-of-state

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[2] O.R.C. § 5733.05(B)(2).

economic activity, increases the tax liability of out-of-state actors, decreases the tax liability of in-state actors at the expense of out-of-state businesses, nor discriminates against interstate commerce.

The Ohio investment tax credit is unlike any aspect of state tax law that this Court has previously invalidated on dormant Commerce Clause grounds. The Court has emphasized that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977), and that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991).

The court of appeals seriously overreached in declaring the Ohio investment tax credit to be unconstitutional and in enjoining its enforcement. This Court should reject on intersecting Commerce Clause and federalism grounds the significant encroachment on the powers of a state to structure its tax system in order "to encourage the growth and development of [its] commerce and industry" that the Sixth Circuit's decision below represents.

ARGUMENT

THE OHIO INVESTMENT TAX CREDIT PROMOTES RATHER THAN BURDENS INTERSTATE COMMERCE.

Ohio's tax incentive for local investment does not discriminate against interstate commerce; in fact, it meaningfully promotes interstate commerce. This Court has explained that the "the Commerce Clause prohibits economic protectionism—that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330

(1996).[3] Ohio's investment tax credit neither seeks nor achieves economic protectionism. It rewards specific in-state economic development but provides no systematic advantage to local businesses, activities or transactions over out-of-state actors, activities or transactions. While the Ohio investment tax credit benefits ***local*** development—as all economic development incentives do—that is not the same thing as economic protectionism.

The Ohio investment tax credit does not discriminate against interstate commerce. Discrimination prohibited by the Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994). The anti-discrimination principle is designed to invalidate protectionist laws that provide a competitive advantage to in-state businesses or in-state commercial activities.[4] But the Ohio investment tax credit does not discriminate against any entity on account of its out-of-state location, activities or transactions. Simply put, the Ohio investment tax credit poses no discriminatory burden on interstate commerce whatever. It does not, for example, tax out-of-state companies more for engaging in activities outside Ohio than in-state

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[3] Internal quotations from *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988), respectively, omitted in the interests of clarity.

[4] *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the primary purpose of the dormant Commerce Clause is "to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than provide the basis for questioning a State's right to experiment with different incentives to business").

businesses for engaging in activities in Ohio; in fact, the effect of the investment tax credit is quite the opposite. Nor does it penalize any commercial actor for engaging in transactions or economic activities outside Ohio.

Suppose the existence of two identical manufacturing businesses. Each has decided to spend an identical amount of capital in the same tax year of 2005 for new equipment and machinery. One company has no Ohio operations or presence; the other company has had Ohio operations and an Ohio presence for a period of time longer than the preceding four years.[5] For the out-of-state company, the Ohio investment tax credit promotes interstate commerce by encouraging it to invest in new economic development in Ohio. This incentive is crucial to the ability of local governments to compete and attract businesses to relocate or expand their local operations.

If the out-of-state company decided to invest in new machinery and equipment in Ohio, it would be entitled to a credit equal to the entire 7.5% of its expenditures on new

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[5] The Ohio investment tax credit for new machinery and equipment purchased in 2005 and installed in Ohio would equal 7.5% of the difference by which the company's 2005 qualifying investments exceeded the annual average of its qualifying expenditures in Ohio during the three years 1999, 2000 and 2001. R.C. § 5733.33(C)(1). The credit so computed would then be spread in equal parts over the succeeding seven years through 2012, R.C. § 5733.33(C)(4), and credited against the company's Ohio franchise tax (based on the company's net worth) or income tax (based on net taxable income) liabilities in those years. R.C. § 5733.33(B)(1). In Ohio, a company calculates both its franchise tax and its income tax for each year, R.C. §§ 5733.05(B) and (C), and pays the higher of the two taxes. R.C. § 5733.06; *Wesnovtek Corp. v. Wilkins*, 105 Ohio St.3d 312, 2005-Ohio-1826, ¶ 2 ("[t]he Ohio franchise tax is an excise tax levied upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state").

machinery and equipment installed in Ohio against the new franchise or income tax liability its new Ohio operations would generate, since it has no prior qualifying investments in Ohio. There would be no "coercion" created by the state's taxing power in the sense that concerns Professor Hellerstein[6] because the company would be taxed only on new activities in Ohio that generated new franchise tax or income tax liability.

If, however, the out-of-state company decided to make the investment in its home state, or in any other state for that matter, Ohio's investment tax credit has absolutely no effect on the company's tax liability. The company has no Ohio franchise or income tax liability, and the Ohio investment tax credit neither increases nor decreases the company's tax liability, if any, in the state in which it located the new investment of machinery and equipment.

The foregoing stands in stark contrast to protectionist state statutes that (i) impose greater tax liability on out-of-state economic activities than on identical in-state activities,[7] (ii) burden out-of-state consumers with greater tax liability than in-state consumers who are "substantially protected against the impact of the [tax],"[8] (iii) "impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State" and penalize increased out-of-state commercial activities even when the amount of in-state business remained constant,[9]

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[6] *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 806-15 (1996).

[7] *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977).

[8] *Maryland v. Louisiana*, 451 U.S. 725, 756, 757 (1981).

[9] *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 401 & n.9, 404 (1984).

(iv) levy a tax on all products sold within the state but exempt from such tax those products made by in-state manufacturers,[10] (v) provide a tax credit against a state sales tax on the sale of products produced in-state but not on the sale of out-of-state products,[11] and (vi) tax both in-state and out-of-state activities for the purpose of funding rebates or subsidies to the in-state actors.[12] Each of these discriminatory state taxes invalidated by this Court on dormant Commerce Clause grounds is fundamentally distinguishable from the Ohio investment tax credit at issue in this case.

For the company already located in Ohio, the choice is whether to expand or replace its facilities in Ohio or to locate the new investment in another state. If the new machinery and equipment will be used to expand production over and above existing capacity, then the decision to invest in Ohio would actually ***increase*** the company's Ohio tax liability to the extent the business activity facilitated by the new investment creates greater net worth or net income for the company, which increase will then typically be partially offset by the investment tax credit. On the other hand, if the Ohio company decided to locate the new property outside Ohio, once again the decision to expand the company's operations to another state furthers rather than hinders the interests of inter-state commerce. The Ohio company would now be transacting business in at least two states, and would ***apportion*** its franchise and income taxes between those states. O.R.C. § 5733.05(B)(2); *Harsco Corp. v. Tracy*, 85 Ohio St.3d 382, 383 (1999). Thus, by deciding to place the new machinery and equipment outside of Ohio, the Ohio company would be ***lowering*** its Ohio taxes. Furthermore, if the other state has a lower tax rate than Ohio for franchise and income taxes, the Ohio company's decision to locate the

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[10] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-73 (1984).

[11] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).

[12] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994).

new investment outside of Ohio would not only lower its Ohio taxes, it would also reduce the company's aggregate tax liability.

The Sixth Circuit's decision below rests on the false premise that the Ohio investment tax credit ineluctably places "golden handcuffs" on Ohio businesses, coercing them to remain shackled to Ohio and discriminating against interstate commerce through economic incentives too desirable to pass up. As the court of appeals erroneously presumed:

> the economic effect of the Ohio investment tax credit is to encourage further investment in-state ***at the expense of development in other states*** and . . . the result is to hinder free trade among the states.

Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 745 (6th Cir. 2004) (emphasis supplied). This conclusion is demonstrably false as a matter of logic, experience and economic theory. The Sixth Circuit's reasoning that to reward companies for investing in Ohio thereby discourages them from investing elsewhere is founded upon a false syllogism.

Moreover, since only one state would be able to tax a company's new investment of machinery and equipment in its franchise tax base if every state were to adopt the identical franchise tax and investment tax credit, the Ohio investment tax credit is "internally consistent."[13] Importantly, the fact that the reach of a state's regulatory powers and incentive policies properly ends at its own borders should not be confused with the repugnant idea of intrastate protectionism.

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[13] *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). In order to be internally consistent, a tax must not impose a greater burden on interstate commerce than on intrastate commerce if it were assumed to be imposed by every state. This test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 183.

The Ohio investment tax credit is not rendered unconstitutionally protectionist merely because it does not reward investments made outside of Ohio. Other states remain free to reward, ignore, or even penalize similar investment activity within their own borders.

It is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991). It is likewise explicitly clear that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). As Justice Stevens observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring).

The only type of investment tax credit that could violate the dormant commerce clause is one that discriminates against out-of-state activities or actors in favor of their in-state competitors. *See Bacchus*, 468 U.S. at 272 ("a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses"). No such discrimination is posed by the Ohio investment tax credit, which taxes only intrastate transactions.

Declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Given the serious flaws in the economic analysis and constitutional reasoning of the decision below, this Court should reject the Sixth Circuit's significant encroach-

ment on "laudatory" state prerogatives to design their tax systems "to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp.*, 498 U.S. at 385. The Ohio investment tax credit properly fulfills that goal and should be upheld.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

ERIC H. ZAGRANS *
WOMBLE CARLYLE SANDRIDGE & RICE
1401 Eye Street, N.W., 7th Floor
Washington, D.C. 20005
(202) 857-4516

L. NEILL EDWARDS
WOMBLE CARLYLE SANDRIDGE & RICE
2530 Meridian Parkway
Suite 400
Durham, North Carolina 27713
(919) 484-2357

* Counsel of Record

Counsel for Amici Curiae